

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES A. BURK, JR., et al.,)
)
 PLAINTIFFS,) CASE NO. 2:20-cv-6256
)
 vs.)
)
THE CITY OF COLUMBUS, et al.,)
)
 DEFENDANTS.)

)

TRANSCRIPT OF JURY TRIAL PROCEEDINGS - VOLUME 2
BEFORE THE HONORABLE JAMES L. GRAHAM
TUESDAY, NOVEMBER 5, 2024; 9:09 A.M.
COLUMBUS, OHIO

APPEARANCES:

FOR THE PLAINTIFFS:

Cooper Elliott, LLC
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FOR THE DEFENDANTS:

Columbus City Attorney's Office
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Proceedings recorded by mechanical stenography, transcript
produced by computer.

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TUESDAY MORNING SESSION

NOVEMBER 5, 2024

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(Jury in at 9:09 a.m.)

(The following proceedings were had in open court.)

THE COURT: Good morning, ladies and gentlemen.

Counsel, I believe we had Mr. Burk on the witness stand.

Mr. Burk, you may resume your seat there.

MS. PICKERILL: Your Honor, before I re-begin with questioning, I did have one issue that I wanted to get some clarification on from Your Honor. Would it be possible to have a sidebar?

THE COURT: Yes.

(The following proceeding was held at sidebar.)

MS. PICKERILL: Your Honor, before trial yesterday you said that you were reserving your judgment on whether some of those ATF documents talking about Mr. Burk's bad behavior could come into evidence.

We believe that during the opening and during Mr. Burk's direct examination, I believe his counsel directly opened that door. During Mr. Burk's testimony he talked about various awards and accommodations that he had with ATF for following policies. He also talked about how he properly followed his training when he didn't take out his badge at

1 certain times.

2 Additionally, in the opening, Ms. Chin represented the
3 only discipline Mr. Burk has ever had with ATF was the incident
4 with Kroger. She also explained to the jury that Mr. Burk was
5 fired, but then said that defense counsel would be misleading
6 if it were to bring that up.

7 At this time we believe that that door is open for us
8 to explain the context of all of these statements that
9 plaintiff has made.

10 Finally, Your Honor, we have -- it's been represented
11 to us that plaintiff intends to call former Agent Herndon as
12 one of their witnesses. This particular witness was only put
13 on the trial list in order to rebut those ATF documents and to
14 bolster Mr. Burk's credibility and his ability to follow the
15 policies of ATF. If that evidence is allowed to come in, we
16 certainly think that the door is open for us to discuss those
17 disciplinary records.

18 I wanted to check with you before finishing the
19 cross-examination of Mr. Burk.

20 THE COURT: Okay. Counsel for plaintiff, what do you
21 say?

22 MR. KEYES: Thank you, Your Honor.

23 So our objection to those evidentiary materials is
24 preserved in the rulings on the motions in limine, and in the
25 Court's follow-up orders late last week I believe it was made

1 clear that the Court believed that those -- that the evidence
2 regarding Mr. Burk's termination proceedings would come in for
3 various reasons.

4 So we still stand by our objection. For the record,
5 our objection has been preserved.

6 Our objection --

7 THE COURT: Okay. But one of the counsel's arguments,
8 defense counsel, is saying that you opened the door for this in
9 comments made during the opening statement.

10 MS. PICKERILL: As well as Mr. Burk's direct
11 examination, yes.

12 THE COURT: As well -- you're talking there about the
13 awards he received and so forth?

14 MR. KEYES: We can respond specifically to those
15 points, Your Honor.

16 THE COURT: So what exactly was said in opening
17 statement that you think opened the door?

18 MS. PICKERILL: Yes, Your Honor.

19 Ms. Chin said to the jury that they will learn that
20 the only discipline that Mr. Burk ever received while at ATF
21 was for that incident at Kroger. She also said that -- she
22 told the jury that we, defense counsel, would be presenting
23 evidence that Mr. Burk had been terminated from ATF and then
24 told the jury that this was misleading.

25 THE COURT: That this was?

1 MS. PICKERILL: That that would be misleading, to say
2 that he had been terminated.

3 Without any additional context, the jury is left with
4 only that statement and the notion that we, as defense counsel,
5 are misleading them in some way. We're not allowed to show
6 them that evidence.

7 THE COURT: So do you agree that's what your
8 co-counsel said in opening statement?

9 MR. KEYES: I believe that the -- on the first issue
10 in reference to the prior discipline, I don't believe that the
11 statement was that that was the only discipline he ever
12 received. I believe the context of that statement was before
13 July 7th, 2020, before the date that we're talking about.

14 On the comment about termination, I agree that
15 Ms. Chin said in opening statement that defense counsel would
16 likely present evidence of his termination and that it would be
17 misleading, and those comments were based on the Court's prior
18 rulings that these materials would come in.

19 So we would submit, just again to preserve -- that our
20 objection remains preserved because the comment in opening
21 statement is not evidence, as the Court has already instructed
22 the jury.

23 That said, our -- the objections we would raise now
24 are on the same basis that we had raised before trial in motion
25 in limine briefing.

1 So we understand the Court's ruling on those issues
2 that that evidence was likely to be allowed in. We would
3 object on the same basis that those rulings that it is a
4 nonfinal determination that was canceled specifically by ATF,
5 the agency --

6 THE COURT: Yes, I've read all of that.

7 MR. KEYES: Yes, Your Honor. I didn't want to --

8 THE COURT: I'm having some difficulty remembering
9 precisely what Ms. Chin may have said, and we may ask the
10 reporter to read that back for us. But first I'd like to know
11 just what part of this -- these records you're going -- that
12 you wish to inquire about.

13 MS. PICKERILL: Specifically the notice of proposed
14 termination and the notice of final decision of termination.
15 If I can --

16 THE LAW CLERK: In November?

17 MS. PICKERILL: Correct. Thank you.

18 If you want to know the specific quotes that I will be
19 referencing --

20 THE COURT: How are they relevant?

21 MS. PICKERILL: They are relevant because the officers
22 are going to testify that they doubted Mr. Burk's claim that he
23 was a federal agent. Part of the reason they doubted it was
24 because he was not following those policies that they
25 understood federal agents to have to comply with.

1 The ATF documents all corroborate that understanding.
2 Thus, proving to the jury that the defendant -- or offering
3 some proof to the jury that the defendant officers' both
4 interpretations and, therefore, actions based upon it were
5 reasonable, which is the exact question the jury is tasked with
6 answering.

7 And, Your Honor, if we want to reserve the issue of
8 the punishment, the termination specifically, I'm happy to
9 leave my questioning only to the policies that he violated and
10 using those documents to show that, and we can talk about the
11 termination or his severance from ATF potentially later at a
12 damages trial. But those finding I would -- I believe are
13 still relevant to the reasonableness.

14 THE COURT: All right. What if we -- I've been
15 struggling with the issue of determining just what Mr. Burk was
16 required to do under the uniform standards for law enforcement,
17 and I've been wondering just what evidence I might hear about
18 the scope of those standards, and I'm -- I believe that the
19 disciplinary records do reflect the standards that the federal
20 government, and specifically the ATF, applied to Mr. Burk; and
21 I have been considering admitting into evidence those parts of
22 the disciplinary proceeding in order to establish that that was
23 part of the standards of law enforcement that he was required
24 to follow during these events.

25 If those records are relevant, I think that would be

1 the best way to get those matters before the jury and it would
2 be much better than trying to develop this during the
3 cross-examination of Mr. Burk.

4 Now, was there anything else in the disciplinary
5 records that you believe would be admissible to the issue of
6 credibility or anything like that?

7 MS. PICKERILL: Your Honor, I think it all sort of
8 goes to his credibility because he's testified that he followed
9 policy. And if ATF finds that that is not true, then that goes
10 against his credibility of understanding his policies or
11 interpreting his own actions or his ability to reflect on that
12 day.

13 THE COURT: Okay. So now I want to -- I want to see
14 exactly what Ms. Chin said, so I'm going to excuse the jury
15 while our court reporter finds that part of the opening
16 statement.

17 MS. PICKERILL: Yes, Your Honor.

18 THE COURT: All right.

19 MR. KEYES: Your Honor, briefly?

20 THE COURT: Yes.

21 MR. KEYES: On the last comment that Ms. Pickerill
22 made --

23 THE COURT: We're going to excuse the jury.

24 MR. KEYES: Okay. I will wait then.

25 THE COURT: You can say anything you want to after

1 that.

2 MR. KEYES: Thank you.

3 (The following proceedings were had in open court.)

4 THE COURT: Ladies and gentlemen, a request for a
5 sidebar conference to discuss legal issues is a normal part of
6 any trial, and usually the Court's able to rule on those
7 matters at the sidebar conference. However, in this case I
8 need to refer to some additional materials before I make a
9 final ruling on the issue the lawyers have brought up with me.

10 It's an issue of law that concerns the Court, and it's
11 not one of the matters that you folks are concerned with, and
12 I'm going to have to make a ruling on the issue that's been
13 raised.

14 So it's going to take a few minutes to get the
15 additional material that I need, so we're going to excuse you
16 folks to the jury room while we do this.

17 And this is probably not the first time this is going
18 to happen. It's a usual part of any trial, and we want to make
19 sure that we get everything right so that you have the correct
20 evidence that you need to decide the case.

21 We're going to excuse you for the next 10 minutes or
22 so.

23 THE COURTROOM DEPUTY CLERK: Please rise.

24 (Jury out at 9:22 a.m.)

25 THE COURT: All right. Please be comfortable,

1 Counsel.

2 I'm going to ask our reporter to see if she can find
3 the part of the record.

4 Anything that counsel can do to help you?

5 (Discussion had off the record.)

6 THE COURT: All right. It looks like I interrupted
7 opening statement and perhaps prevented plaintiffs' counsel
8 from opening the door.

9 She didn't get far, and I think the potential
10 prejudice of permitting cross-examination on this is -- it is
11 grounds for me to sustain the objection.

12 However, I'm going to reserve ruling on the ultimate
13 admissibility of parts of these disciplinary records relating
14 to termination because those records do contain significant
15 evidence of the standards that the ATF and law enforcement in
16 general placed upon Mr. Burk at the time of this incident.

17 I'm going to sustain the objection.

18 All right. We can bring the jury back.

19 MR. KEYES: Thank you, Your Honor.

20 (Jury in at 9:35 a.m.)

21 THE COURT: All right. Ladies and gentlemen, we have
22 resolved the matter. Thank you for your patience. You may be
23 seated.

24 Counsel, you may continue.

25 MS. PICKERILL: Thank you, Your Honor.

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JAMES A. BURK, JR.

Called as a witness on behalf of the Plaintiffs, having been previously duly sworn, resumed the stand and testified as follows:

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CROSS-EXAMINATION (cont'd)

BY MS. PICKERILL:

Q Good morning, Mr. Burk.

A Good morning.

Q When we left off yesterday afternoon we were talking about what happened when you arrived at Sarah Al Maliki's house. Do you remember that?

A Yes.

Q And when you had talked to Mr. Keyes before I got up here to ask you some questions, he had talked to you about the credentials you had on you that day.

A Yes.

Q Okay. I'm going to put those back up on the screen.

Can you see that?

Are those the same credentials you were looking at yesterday?

THE COURT: So can the jury see these?

MS. PICKERILL: Not yet, Your Honor. I'll ask for it in just a second.

1 THE COURT: Very well. Go ahead.

2 MS. PICKERILL: We can go ahead and display it for the
3 jury.

4 MR. KEYES: It's a joint exhibit, Your Honor, so we
5 have no objection to it going out.

6 THE COURT: Very well.

7 MR. KEYES: Thank you.

8 THE WITNESS: The screen has got a little --

9 BY MS. PICKERILL:

10 Q Oh, is it -- are you able to write on it?

11 A No, I was just trying to get that off of it.

12 MS. PICKERILL: It seems to be a little tech box.

13 THE WITNESS: Thank you.

14 BY MS. PICKERILL:

15 Q Okay. So there we go.

16 That first page there, those are your credentials,
17 right?

18 A That is a portion of it, yes. Correct.

19 Q The second page is your badge, right?

20 A That is correct.

21 Q Okay. And when you were at Sarah Al Maliki's house, you
22 showed her what was on this first page, correct?

23 A I ultimately showed her what was on both pages because I
24 was asked for the badge as well, I believe.

25 Q Okay. You would agree with me that this first page is

1 not a badge, correct?

2 A That's correct. That's my photo and my authority and
3 the agency and my position.

4 Q Okay. That's the first page of this document, right?

5 A That's the first fold open of the credentials, correct.

6 Q And it's your testimony that you showed her this as well
7 as what's on the second page?

8 A I believe so, yes, through the window when the
9 discussion was happening.

10 Q Okay. We talked a little bit yesterday about when you
11 sat for a deposition. Do you remember that?

12 A Yes, I remember sitting for the deposition.

13 Q Do you remember being under oath for that deposition?

14 A Yes, I do.

15 Q Same oath you're under today?

16 A Yes.

17 MS. PICKERILL: Could we please take this down from
18 the jury and just have it for counsel and the witness?

19 BY MS. PICKERILL:

20 Q I'm going to pull up that same transcript of your
21 deposition and go to page 151. It starts on line 10.

22 Starting on line 10 there I asked you the question:
23 Okay. Did you show Sarah anything other than the credentials
24 that we have talked about on the first page?

25 Your answer: No.

1 I read that correctly, didn't I?

2 A No, that's not -- no. It's no, and then I explained I
3 showed her the most important item to validate who I was. So I
4 showed her my credentials.

5 Q You didn't show her your badge?

6 A Well, the badge was shown because I believe it was asked
7 for in order to verify my badge number when she was on the
8 phone.

9 There was no visual between us and the door. It wasn't
10 until I was able to show those to her through the window. I
11 wasn't able to show them to her.

12 Q You would agree with me that when I asked you this
13 question about a year ago and you were under oath, and I asked
14 you whether you showed her anything other than that first page,
15 your answer was no, because that was the most important document
16 to you?

17 A Correct. It had my photo. It had my agency. It had
18 everything on there, yes, correct.

19 Q On that day, you weren't wearing a badge on a chain
20 around your neck, were you?

21 A No.

22 Q You weren't wearing a badge affixed to your belt, were
23 you?

24 A No. We wouldn't necessarily -- no, I had my
25 credentials.

1 Q Your credentials also weren't outwardly visible, were
2 they?

3 A They normally never are, no.

4 Q And they weren't that day?

5 A No, they were in my pocket.

6 Q One reason you don't like to have your badge immediately
7 visible on these types of runs is because they don't create a
8 warm, fuzzy feeling with people?

9 A It's my experience, and the experience of others in this
10 same capacity, is not to overwhelm the situation with an
11 authoritative police presence. It's to create a dialogue. It's
12 an administrative activity. And many times, especially at that
13 time, the presence causes people to be less responsive and not
14 want to engage out of fear of law enforcement for whatever
15 reason that may be.

16 Q And that's one of the reasons why you don't like to
17 always wear a visible badge when you go on these runs?

18 A I would wear the exact same thing that we're authorized
19 to wear and carry my --

20 Q Mr. Burk, I'm asking you specifically about a visible
21 badge.

22 A No. I carry the credentials. I carry everything on me
23 exactly the same way, and I don't carry visible markings, no.

24 Q And when Sarah told you -- so let me back up a little
25 bit.

1 So you did at one point remove your credentials and your
2 badge from your pocket, right?

3 A Yes, I did.

4 Q And just to be clear, I don't know if it's clear from
5 the photograph, those are all sort of in one billfold, right?

6 A It's contained in one -- yeah, one fold. One part of it
7 opens up to show your photo, your agency, your authority. You
8 flip the middle divider over and then it presents your badge
9 with its identification marks.

10 Q Those are all in one item?

11 A Contained in one. They are not two separate items.

12 Q When Sarah told you that she was calling 911, you put
13 your badge and your credentials back in your pocket; is that
14 right?

15 A Yes, I did.

16 Q And that billfold in your pocket was the only identifier
17 that you had on you on July 7, 2020, correct?

18 A As far as my credentials are concerned, yes.

19 Q It was the only identifier you had on you period that
20 day, correct?

21 A On my person, yes.

22 Q Okay. When Sarah told you that she was calling the
23 police, you told her, "I am the police."

24 A I did say that, yes.

25 Q When Sarah told you that she was calling the police, you

1 understood the police were on their way to her house, right?

2 A I would believe they would be if she said she was
3 calling the police, yes.

4 Q That's what you believed on that day?

5 A Yes.

6 Q You waited, I think you told us, five to ten minutes
7 before the police got there?

8 A Approximately, yes.

9 Q While you waited that five to ten minutes, you stayed on
10 Sarah's porch, right?

11 A Yes, I did.

12 Q And you stayed facing her door?

13 A I kept my eyes on her door, yes.

14 Q During that five to ten minutes, you didn't take the
15 opportunity to call Columbus Police Department and verify your
16 identity to them while they were on the way, did you?

17 A No. I stayed focused on the door. I was aware of the
18 dialogue and my information being transmitted to the Columbus
19 Police Department, so I stayed.

20 Q So that's a no?

21 A That's a no.

22 Q You also didn't call -- didn't take this opportunity to
23 call the local Columbus branch of ATF to let them know that you
24 were there so that they could verify your identity?

25 A No, I did not do that. No.

1 Q You didn't take the gun off of your hip, did you?

2 A I would never do that.

3 Q You didn't take your badge back out of your pocket to
4 have it ready to show the officers and verify your identity when
5 they got there, did you?

6 A No.

7 Q Okay. You didn't hold the badge in your hand so that
8 way when the officers came up they would be able to see it, did
9 you?

10 A No.

11 Q Part of the reason you told me that you didn't do this
12 was because you didn't want to hold your badge and your folder
13 at the same time; is that right?

14 A No. I kept my hands available in the event that
15 something was going to transpire at the door. If there was a
16 person that actually answered the door, I would be able to
17 physically manipulate myself to present the items I needed to
18 show, or if it became a situation that I had to protect myself,
19 then I had a hand to do that. It's just standard practice for
20 standing in a doorway.

21 Q And when I asked you why you didn't want to hold the
22 badge in the same hand as your folder, one of the things you
23 said was that it would be a big deal if you were to lose your
24 gun or your creds, so you wanted to keep them secure; is that
25 right?

1 A Well, that is correct.

2 Q To you, the fact that police were on their way was a
3 relief; is that right?

4 A Yes. Under the circumstances, yes, it was.

5 Q It was a relief to you because you always get
6 cooperation?

7 A In the same situation I've -- it's always been a very
8 cooperative dialogue and exchange when the local law enforcement
9 arrives.

10 Q On July 7, 2020, you had an ATF tactical vest in the
11 back of your car, didn't you?

12 A Yes, I did.

13 Q A tactical vest is a bulletproof vest; is that right?

14 A Yes.

15 Q You didn't just have that vest; you had other ATF
16 tactical gear in your car that day, didn't you?

17 A I did. Yes, I did.

18 Q You didn't retrieve any of that tactical gear while you
19 waited five to ten minutes for the police to arrive, did you?

20 A No, absolutely not.

21 Q At this time I want to look at some of the body-worn
22 camera footage with you and ask you some questions about it.

23 I'm going to pull up Joint Exhibit I.

24 MS. PICKERILL: If we could have it displayed to the
25 jury, please. I'm going to start playing it at 5 minutes and

1 7 seconds.

2 (Video was played in open court.)

3 BY MS. PICKERILL:

4 Q I've paused it at 6 minutes and 38 seconds.

5 When Officer Fihe arrived on scene he was driving a
6 marked CPD cruiser; is that right?

7 A Yes.

8 Q You waived Officer Fihe over to you when you saw him,
9 right?

10 A I attempted to, yes.

11 Q And you waived him over as you were turning around to
12 face him, correct?

13 A I attempted to waive him over and then turn my direction
14 back to the door.

15 Q So you had been facing the door, you turned around,
16 waived him over, and then turned back around?

17 A I noticed his approach, the vehicle arriving. I waived
18 him over, and then turned my position back towards the door. I
19 was trying to, as I previously stated, assist him in locating
20 where I was standing. Briefly, albeit, I did that and then
21 turned my focus back to the door.

22 Q Do we see that on the video?

23 A No, because what you see on the video is his body cam
24 facing me, not a visual of the body camera from inside the
25 vehicle as it's approaching.

1 Q So that's a no?

2 A It's a no.

3 Q When you very first saw Officer Fihe arrive on the
4 scene, you wholeheartedly believed that he was going to remove
5 your firearm, make sure that you were on the ground, handcuff
6 you, and put you in a cruiser before he was able to do anything
7 else?

8 A His demeanor led me to believe that that's what his
9 intentions were the whole time, yes. It's not what I expected;
10 it's what I believed to be the case.

11 Q So all of the choices that you made were with that in
12 mind, with that initial belief in mind?

13 A Yes.

14 Q When Officer Fihe got out of his car and started to
15 approach you, he did not have his gun pointed at you, did he?

16 A No, he had it removed from his holster in a ready-type
17 position.

18 Q Down by his side?

19 A Outside of his holster, yes.

20 Q Not raised and pointed at the ground?

21 A It wasn't in the position I see it right now, but I
22 can't -- I know it was out of his holster. What specific angle
23 he had it, I cannot say. I just saw him presenting his firearm,
24 and that's what I was responding to.

25 Q But it wasn't pointed at you?

1 A Not at that second, no.

2 Q Before he pointed his gun at you, the very first thing
3 you said to Officer Fihe was, "I'm a federal fucking agent."

4 A Yes.

5 Q You didn't tell Officer Fihe that your badge was in your
6 pocket because you needed to identify yourself as an agent
7 first; is that right?

8 A I identified myself as I did as a federal agent. That
9 was the first thing when I turned around and saw his pistol out.

10 Q But the reason you didn't tell him that your badge was
11 in your pocket at that time was because you felt it was
12 important to first tell him that you were a federal fucking
13 agent; is that right?

14 A That was my first instinct, is to identify myself as a
15 federal agent, expecting the next step to be, "Can I see some
16 credentials?"

17 Q And you were trying to convey that you're a federal
18 agent, in your words, in an emotional fashion; is that right?

19 A Can you ask me that question again?

20 Q Sure.

21 In your words, you were trying to convey to Officer Fihe
22 the fact that you were a federal agent, and you were trying to
23 do that in an emotional fashion?

24 A Well, it was, yes, in an emotional fashion under the
25 circumstances and what I was looking at, yes.

1 Q And it's your opinion that it's a normal course of
2 action to identify yourself by using swear words?

3 A No. Normally I'm just asked to present my credentials.
4 I'm not asked to -- I'm not in this situation, not confronted
5 with somebody with their firearm already in a heightened sense
6 after I had already provided the information as to who I was.

7 No, that would not normally be the dialogue. I would be
8 asked for my credentials or there would be a conversation of
9 sort. At which time, I would be able to verify who I was
10 through either questions and answers, an examination of my
11 credentials, or both.

12 Q My question was a bit different.

13 You feel that it was within the normal course of action,
14 under these circumstances, to identify yourself by using swear
15 words; is that correct?

16 A That's what I did in that moment, yes.

17 Q And you believe that that is within the normal course of
18 action for an ATF agent?

19 A It's not the normal course of action, no. In this
20 situation I did, under the circumstances, yes.

21 Q Officer Fihe gave you a command to get on the ground,
22 correct?

23 A Yes, he did.

24 Q He actually gave you that command a number of times,
25 right?

1 A Yes, he did.

2 Q You understood that command, right?

3 A I understood what his intentions were, yes.

4 Q But you didn't get on the ground because you were
5 worried about your safety; is that right?

6 A That is correct.

7 Q You were worried about your safety because of Officer
8 Fihe, right?

9 A That is one of the elements that I was concerned about,
10 yes.

11 Q You were also worried about your safety because the
12 woman -- because Sarah, we know her name, could have been lying
13 to you and her husband might be home?

14 A That's one option, yes, absolutely.

15 Q Now, her husband, Alla, he didn't make you worried
16 enough to bring a partner to the scene with you, did he?

17 A No.

18 Q He didn't make you worried enough to put on your
19 tactical vest when going to his house, did he?

20 A No. That's not what we normally would do, no.

21 Q But he made you worried enough about your safety that
22 you couldn't comply with Officer Fihe's commands?

23 A Well, there's always a concern, yes. There's a concern
24 because now my attention is being drawn away from a residence
25 that I'm conducting an investigation at where there is believed

1 to be a firearm possessed illegally. I cannot account for the
2 mindset or the actions of anybody behind that door, but I have
3 to be vigilant of it, so yes.

4 Q You felt that instead of getting on the ground, standing
5 up and disregarding Officer Fihe's commands was the most
6 tactical choice you could make?

7 A In that moment, it -- yes. In that moment, yes.

8 Q When Officer Fihe first told you to get on the ground,
9 you walked off of the porch; is that correct?

10 A Yes.

11 Q You claimed that you did this because it would give
12 Officer Fihe the very best presentation of yourself?

13 A Yes. I'm in his clear view. I couldn't be any more in
14 his clear view at that moment with my hands up. So yes,
15 that's --

16 Q When Officer Fihe told you to get on the ground, you
17 felt that the safest option was to ignore that command and walk
18 into more lighting; is that right?

19 A Yes, the safest place for me was to just stand still.
20 He has his firearm pointed at me. Yes, that was my decision at
21 the time, to remain there well visible to him.

22 Q And you actually told Officer Fihe that you would not be
23 getting on the ground?

24 A Yes.

25 Q You were trained at ATF to follow the commands of local

1 law enforcement officers, weren't you?

2 A Yes.

3 Q And the reason that you told Officer Fihe that you would
4 not get on the ground is because you felt that your personal
5 safety supersedes everything else?

6 A Yes, your personal safety does supersede -- yes, it
7 does. You have to take that into account.

8 MS. PICKERILL: I'm going to start playing the video,
9 Joint Exhibit I, from where I stopped at 6:38.

10 (Video was played in open court.)

11 BY MS. PICKERILL:

12 Q When Officer Winchell arrived on the scene you got on
13 the ground on your own; is that right?

14 A When I noticed the second officer arriving and following
15 suit with the first officer, at that time I decided there was
16 not going to be any dialogue. So, yes, I got on the ground.

17 Q They didn't have to place you on the ground; you got on
18 the ground on your own?

19 A Yes, I did.

20 Q And you would agree with me that law enforcement
21 officers, they place suspects facedown on the ground all of the
22 time, right?

23 A Suspects, yes. Yes.

24 Q And we heard in the video the officers told you to put
25 your hands behind your back, right?

1 A Yes.

2 Q You knew what that meant?

3 A I knew what that meant.

4 Q You knew that when they said put your hands behind your
5 back, they meant at the small of your back to be handcuffed,
6 right?

7 A Yes.

8 Q But once you were on the ground you were trying to stop
9 the situation from going any further, weren't you?

10 A Yes, I was.

11 Q You were trying to get the officers to pause what they
12 were doing?

13 A Yes, I was.

14 Q Because you didn't want to be handcuffed, did you?

15 A Of course not, no.

16 Q And you didn't put your hands behind your back because
17 it was too difficult for you; is that right?

18 A It was becoming very difficult for me to do so, yes.

19 Q But if you had been standing, you would have had no
20 problem?

21 A If I was standing without anybody physically on top of
22 me it would be much easier to put my hands behind my back, yes.

23 MS. PICKERILL: I'm going to start the video again
24 where we left off at 6:53.

25 (Video was played in open court.)

1 BY MS. PICKERILL:

2 Q Okay. I want to ask you some questions specifically
3 about what happened in that small portion of the video, and we
4 talked about this previously.

5 Did you see your arm kind of start from behind your back
6 and then move up to the ground next to you?

7 A If you can replay it, I can look at it, yes. Please.

8 Q Absolutely.

9 MS. PICKERILL: I'm starting it at 6 minutes and
10 50 seconds.

11 (Video was played in open court.)

12 BY MS. PICKERILL:

13 Q Did you see that?

14 A Briefly, yes.

15 Q And you have testified that your arm flew up in that
16 fashion because Officer Fihe lost his grip and you moved your
17 arm instinctively?

18 A I don't believe I said that.

19 Q Okay.

20 A My arm flying up -- I'm not sure what the question is.

21 Q So when you were deposed, I asked you what happened in
22 that moment, why your arm flew up, why your arm moved from the
23 small of your back to the ground next to you. Do you remember
24 that?

25 A I don't necessarily remember exactly that, no, I don't.

1 I'm -- right now I'm going by what I'm seeing on the video.

2 So...

3 Q I'm going to play a portion of your deposition where the
4 question is asked.

5 MS. PICKERILL: Could we take that down from the jury?
6 Thank you.

7 MR. KEYES: Thank you.

8 MS. PICKERILL: Yeah, appreciate that.

9 I'm going to start at 52:32.

10 BY MS. PICKERILL:

11 Q You remember that your deposition was also video
12 recorded; is that right?

13 A I believe so, now that you say that.

14 MS. PICKERILL: Could we get this up for the witness
15 and counsel, please?

16 I think that was my mistake. Thank you so much.

17 BY MS. PICKERILL:

18 Q All right. I'm just going to pull up the deposition
19 transcript since we are having some tech issues.

20 Okay. So on line 9 I tell you that I have the video
21 paused at 7 minutes and 2 seconds.

22 I asked you: Did you see where your left arm was at the
23 small of your back and then it moved to kind of be down on the
24 cement next to your chest?

25 A Yes.

1 Q You answered: I saw my arm move, yeah, in the video.
2 Yes.

3 I asked: Okay. Do you remember what happened there?

4 You answered: Looking at the video, it looks as though
5 he was trying to pull my arm one way and lost control of my arm
6 or -- or it slipped, and then my arm obviously came back
7 instinctively. I probably put it on the ground, so that's what
8 I would have suspected happened.

9 I read that correctly, didn't I?

10 A You did, and I agree with that. That helps me have a
11 better understanding of the video.

12 Q Okay. And you believe -- you understand that when that
13 happened, when your arm moved from the small of your back to the
14 ground next to you, that the officers were trying to handcuff
15 you at that time, right?

16 A Yes.

17 Q You would agree that after you were handcuffed, neither
18 officer used a TASER on you again, correct?

19 A After I was handcuffed, no, I wasn't tased anymore.

20 Q And following this, you were seen by medics, correct?

21 A Ambulance personnel, yes.

22 Q They came to the scene of Ms. Al Maliki's house and saw
23 you there?

24 A Yes.

25 Q Mr. Burk, if you were ever to do another one of these

1 gun retrievals, you wouldn't do anything differently than what
2 you did on July 7, 2020; is that right?

3 A At the time I wouldn't have thought anything differently
4 because -- and would have thought everything would have been
5 exactly the same. I had been through a scenario multiple times
6 where law enforcement had been called. I never had the
7 opportunity to present my credentials to the occupant --

8 Q Mr. Burk, my question is actually a lot simpler than all
9 of that.

10 If you were to do one of these runs again, you wouldn't
11 do anything differently, would you?

12 A No. It's the same fashion -- I did every thing the same
13 way, so my answer would be I would do it -- now, in --

14 Q That's okay. That answers my question. Thank you.

15 In fact, you don't think that there's anything you could
16 have done better during this interaction on July 7th, 2020,
17 correct?

18 A There's always things you can do differently. Yes,
19 there's always things you can do differently. Under the
20 circumstances, I did exactly what I thought was the best thing
21 for me to do in those circumstances, under those conditions.

22 Q So is that a no, you don't think there is anything you
23 could have done better?

24 A I could have -- you know, I mean, again, the use of the
25 profanity was more than emotional response. I'm speaking within

1 that entity of one brother law enforcement to another, who I
2 would assume would be, you know, easing into the situation to
3 ask me for any credentials. But I don't know that I would do it
4 any differently under the circumstances, no. I'm just thinking
5 about how the situation evolved. I would likely have done the
6 same thing.

7 Q So you don't believe that there is anything that you
8 could have done better on July 7, 2020?

9 A Yes, there's always things that could be done. When you
10 go back and look at a situation, there's always things you could
11 think about. But I don't know that I would have done it any
12 differently under the circumstances, looking at it -- I mean,
13 could I have not used profanity in the exchange? Sure, I could
14 have done that.

15 But I don't -- if the situation were to happen to unfold
16 again, I would, under that presentation of what I was faced
17 with, I don't know that -- I wouldn't have done anything
18 differently. That would have been my reaction to what I was
19 facing.

20 Q Okay. But you agree with me today that there are things
21 you could have done better?

22 A I think everybody could have did things better, yes.

23 Q You could have done things better, Mr. Burk?

24 A Yes, I could have done different things. I mean, yes,
25 there's certainly variables.

1 Q And you would agree with me that there were points
2 during this interaction that you were not complying with the CPD
3 officers, correct?

4 A Yes, I wasn't -- yeah, there was -- I mean, it's right
5 there on the video. I wasn't complying with their commands, no.

6 MS. PICKERILL: Okay. Thank you very much, Mr. Burk.
7 I have no further questions at this time, Your Honor.

8 THE COURT: All right. And redirect examination?

9 MR. KEYES: Yes, Your Honor. Thank you.

10 - - -

11 REDIRECT EXAMINATION

12 BY MR. KEYES:

13 Q Mr. Burk, let's start with the last point first, when
14 you were asked about whether there were things that could have
15 happened better.

16 Were you addressing in your answers the situation as you
17 were in the moment, or are you speaking from hindsight?

18 A Hindsight.

19 Q I'd like you to look, if you could, please, at Joint
20 Exhibit VII.

21 Relating to the question of what portions of your
22 credentials you showed Ms. Al Maliki when you arrived or when
23 you were at her home, Joint Exhibit VIII, the in-car display
24 from Officer Fihe's vehicle at 13:56:21, it says: He showed her
25 a badge.

1 Do you see that?

2 A Yes.

3 Q And as best to your recollection, is that statement in
4 Officer Fihe's in-car display, the first part, he showed her a
5 badge, is that portion accurate?

6 A Yes.

7 MR. KEYES: We can take that down, please. Thank you.

8 BY MR. KEYES:

9 Q On this issue of what degree of worry you had when you
10 were conducting this retrieval, I want to get into that a little
11 bit -- in a little bit more detail and ask you to sort of divide
12 it out by time for us, if you could.

13 So in terms of before you arrived at the house and
14 knocked on the door, what factored into your consideration of
15 how much worry or how many precautions you had to take in
16 conducting this retrieval?

17 A Well, the criminal history that you ran, the reasons for
18 the prohibiting factor, the time of day, the location of the
19 attempted retrieval, these are all normal considerations that
20 you take into account of how you're going to approach or manner
21 in which you're going to put emphasis on a predetermined threat.

22 In this instance there was very little, other than the
23 immigration prohibiter for the possession of the firearm. The
24 time of day was certainly middle of the day, sunny, bright. The
25 area which the retrieval was going to be attempted, or at least

1 contact with the resident, was not an area of concern based on
2 law enforcement experience for that area.

3 So those were things you take into consideration on how
4 you're going to approach the knock-and-talk attempt at the door
5 and whether it warrants anything additional besides what I
6 arrived with that day.

7 THE COURT: Excuse me, Mr. Keyes. I don't think this
8 is redirect. I don't think there was any cross-examination
9 about any of these things. So maybe move on to something that
10 was covered in the cross-examination.

11 MR. KEYES: Your Honor, respectfully, I believe it was
12 covered in the cross-examination. There was a line of
13 questioning about you were not worried enough to take a
14 partner, you were not worried enough to wear an ATF tactical
15 vest, and the questioning that --

16 THE COURT: All right. Okay. Go ahead. Go ahead.

17 MR. KEYES: Thank you, Your Honor.

18 BY MR. KEYES:

19 Q So you told us about considerations from before you
20 arrived.

21 Your degree of worry or your degree of precaution, did
22 that change in any way after you first arrived at the house?

23 A No. Everything was -- it was as expected or have been
24 encountered in the past on multiple occasions.

25 Q Now, specifically about the residence and what was going

1 on inside, what would have caused you -- I think you explained
2 to some degree on cross-examination concerns about safety from
3 behind the door. What would have caused you to have concerns at
4 that point?

5 A Well, I could tell that there were other occupants in
6 the house. I could not make out -- because I could hear that.
7 Through the wall, through the door, I can hear movement. There
8 wasn't an immediate answer of the door, which is normal in most
9 instances. You knock on the door, somebody answers to see who
10 it is, and you explain.

11 So it was beginning to create a situation where now I do
12 have a concern because the normal course of this type of
13 administrative investigation is now becoming not the normal
14 course, which makes me become a little bit more concerned about
15 the unknowns behind the door because the activity is becoming
16 concerning as to what the person's thinking or doing or
17 occupants may be doing behind the door.

18 Q At the beginning of your examination on
19 cross-examination, when defense counsel asked about your
20 employment history, is that anything that these officers had any
21 knowledge about when they encountered you on July 7, 2020,
22 Officers Fihe and Winchell?

23 MS. PICKERILL: Objection. Lack of personal
24 knowledge.

25 THE COURT: All right. Sustained.

1 MR. KEYES: I can rephrase, Your Honor.

2 BY MR. KEYES:

3 Q Had you ever encountered Officers Fihe or Winchell
4 before July 7, 2020?

5 A No, I had never -- I wasn't aware of them.

6 Q Thank you.

7 Are they ATF agents?

8 A No.

9 Q Had they ever been, to your knowledge?

10 A No.

11 Q And you worked at ATF for how long up to that point?

12 A Sixteen years.

13 Q In the 16 years you worked at ATF, did you come to have
14 a general understanding of who had access to ATF agents'
15 personnel files and records?

16 A Yes.

17 Q Would members of the Columbus Division of Police, patrol
18 officers of the Columbus Division of Police, would they have had
19 any access to your ATF personnel records?

20 A No.

21 MS. PICKERILL: Objection.

22 THE COURT: All right. Sustained.

23 MR. KEYES: May I have a moment to confer with my
24 co-counsel?

25 THE COURT: Yes.

1 (Plaintiffs' counsel conferring off the record.)

2 MR. KEYES: All right. No further questions, Your
3 Honor. Thank you.

4 THE COURT: Very well.

5 Any further cross-examination?

6 MS. PICKERILL: No, Your Honor. Thank you so much.

7 THE COURT: All right. Mr. Burk, that concludes your
8 testimony for now. Thank you, sir. You may step down.

9 And plaintiff may call their next witness.

10 MR. KEYES: Your Honor, our next live witness would be
11 by Zoom, and I see we're approaching 10:30. Would it make
12 sense to take a short recess just to set up the --

13 THE COURT: That makes a lot of sense. We're going to
14 break at 10:30 anyhow, and you probably need to set up for the
15 video and so forth.

16 MR. KEYES: Yes, Your Honor.

17 THE COURT: So we'll take our morning recess now.
18 We'll be in recess for 15 minutes.

19 THE COURTROOM DEPUTY CLERK: Please rise.

20 This court will stand in recess.

21 (Jury out at 10:19 a.m.)

22 (Recess taken from 10:19 a.m. to 10:41 a.m.)

23 (Jury in at 10:41 a.m.)

24 THE COURT: All right. Counsel, who is the next
25 witness?

1 MR. KEYES: Your Honor, our next witness will be Scott
2 DeFoe by live video conference.

3 THE COURT: I don't think we're ready for his
4 testimony.

5 Counsel.

6 (The following proceeding was held at sidebar.)

7 THE COURT: There are major unresolved issues
8 regarding the scope and extent of his testimony which I haven't
9 ruled on, have I?

10 You've got objections.

11 MS. PICKERILL: That's correct, Your Honor, yes.

12 THE COURT: Yeah, which I haven't ruled on.

13 We don't have enough evidence in the record on some of
14 these issues for me to determine whether some of the opinions
15 he's going to give are admissible or not.

16 So you're going to need to call a different witness
17 until we get more evidence in the record. We don't have the --
18 we don't have enough evidence in this record.

19 One of the things I'm particularly concerned about is
20 this issue that Mr. Burk continues to talk about, his concerns
21 over what might be going on behind the doors and so forth, and
22 I know that DeFoe is going to be testifying about that. I
23 don't think we're ready to -- I'm not ready to make a ruling
24 yet on that. I haven't had an opportunity to make a ruling yet
25 on that.

1 I have suggested some of the areas that I think are
2 potentially improper about his testimony. I put those in an
3 order, but I haven't made a final ruling on it, so I think
4 it's -- we're just not ready to proceed with this witness.

5 Do you have another witness you can call?

6 MR. KEYES: Your Honor, we can, yes, that's fine.

7 My only note for the record would be -- first of all,
8 my apologies. I thought that we addressed the issues when we
9 spoke before the trial started yesterday about the areas of
10 Mr. DeFoe's testimony, but I understand from your comments now
11 that there were more issues than what was discussed that are
12 still out there to be resolved. It was on that basis that we
13 thought we could proceed with him today.

14 THE COURT: All right. Well, that's fine.

15 Do we have another witness?

16 MR. KEYES: Yes, Your Honor. We could -- I mean, if
17 the Court would permit us to call Officers Fihe and Winchell
18 live, we could do that. We also had deposition testimony we
19 could read.

20 THE COURT: No, we're not going to call Fihe and
21 Winchell. I ruled on that.

22 MR. KEYES: We have their deposition testimony that we
23 could offer into evidence because that will contain some of the
24 factual items that are relevant to Mr. DeFoe's testimony.

25 We also have the written deposition of ATF which

1 addresses some of the law enforcement standards or credential
2 standards that the Court has indicated concerns about. That
3 would be testimony that could be read into the record as a
4 written deposition.

5 THE COURT: All right. We need to look at those
6 things also.

7 Do we have a witness we can call?

8 MR. KEYES: Not another live witness today, Your
9 Honor.

10 THE COURT: What about Ms. Hilfers?

11 MR. KEYES: Well, Ms. Hilfers' testimony would only be
12 relevant to the damages of the case, Your Honor, and that was
13 subject to your bifurcation.

14 THE COURT: All right. That's true.

15 All right. So you're not going to call any further
16 witnesses other than Mr. DeFoe?

17 MR. KEYES: That would be correct at this point. We
18 had -- with Mr. Herndon, he was -- Mr. Herndon we don't believe
19 we need to call in our case in chief based on the limitations
20 the Court placed on Mr. Burk's cross-examination, so we would
21 not need to call Mr. Herndon as we originally planned, and so
22 our only remaining live witness would be Mr. DeFoe.

23 THE COURT: Okay. All the more important, then, that
24 we address those issues.

25 Okay. I think we ought to send the jury to go vote.

1 MR. KEYES: I think that makes sense, Your Honor.

2 THE COURT: We can stay here and work.

3 MR. KEYES: Thank you.

4 THE COURT: All right. Very well.

5 (The following proceedings were had in open court.)

6 THE COURT: Members of the jury, we're going to send
7 you to vote early, so we're going to recess until tomorrow
8 morning at 9:00.

9 Please remember my usual instructions. Don't discuss
10 this case with anyone. Don't permit anyone to discuss it with
11 you. Don't do any research or investigation of any kind using
12 any resources whatsoever. Just leave the case here in the
13 courthouse, and we'll see you back here tomorrow morning at
14 9:00.

15 (Jury out at 10:49 a.m.)

16 THE COURT: All right. Counsel, you may be
17 comfortable.

18 MR. KEYES: Your Honor, I'm sorry. Before we start,
19 do you mind if I dismiss Mr. DeFoe? He's still on the Zoom
20 right now.

21 THE COURT: Oh, no, go ahead. Tell him we'll be
22 seeing him later.

23 MR. KEYES: Yes, Your Honor. Thank you.

24 Scott, we have some proceedings we have to take care
25 of. You're dismissed for the day, and I'll talk to you --

1 we'll talk to you this -- might be your morning, but later this
2 afternoon.

3 MR. DeFOE: Yes, sir. Thank you.

4 MR. KEYES: Thank you.

5 THE COURT: All right. Let's deal first with these
6 deposition excerpts that you want to make part of the record
7 now.

8 MR. KEYES: Yes, Your Honor.

9 Our initial preference, as we stated, would be to call
10 Officers Fihe and Winchell as on cross-examination as adverse
11 witnesses in our case in chief. Respecting the Court's ruling
12 that we will not be permitted to do that, in the alternative we
13 would be requesting the opportunity to offer select portions of
14 their deposition testimony as affirmative evidence. Because of
15 the fact they are party opponents, we believe that is
16 admissible.

17 So as far as procedure goes, we, this morning, were --
18 before we came to court we were trying to work on identifying
19 portions of the deposition testimony that we believe would be
20 material to Mr. DeFoe's testimony so as to have that into the
21 record before he testifies.

22 We would be glad to share those proposed designations
23 with defense counsel so that if there are any objections or
24 counter-designations that they would desire to make, that they
25 have that opportunity.

1 Since we have the afternoon off --

2 THE COURT: All right. I'm going to let you stay here
3 and work on that.

4 MR. KEYES: Okay. Thank you, Your Honor.

5 Then the other deposition testimony -- it technically
6 is a deposition. It's a deposition by written questions that
7 the defendants had served on ATF as a federal agency, and so
8 there are written answers to written deposition questions, and
9 so there may be some questions and answers in the ATF written
10 deposition that also would be relevant to inform Mr. DeFoe's
11 testimony and some of those issues that the Court has raised.

12 So that would be the other testimony that we would
13 want to work on.

14 THE COURT: Have you identified that testimony?

15 MR. KEYES: We are in the process of doing that.
16 Again, we can work with defense counsel during the afternoon to
17 allow for any objections and so forth.

18 THE COURT: All right. So what else?

19 MR. KEYES: That would be the only additional
20 testimony that we think could be useful to have in the record
21 before Mr. DeFoe's testimony, Your Honor.

22 THE COURT: All right. We'll let counsel work on
23 these issues, and I'm going to take care of some other matters,
24 and I'll be back in about two hours.

25 MS. PICKERILL: Your Honor, if I could briefly just

1 ask one question?

2 THE COURT: Yes.

3 MS. PICKERILL: As we are preparing these documents to
4 give this additional context to Mr. DeFoe's testimony, it's the
5 defense's contention that some of those additional ATF
6 documents would also go to serve that same purpose.

7 Would we be permitted to pull portions of those to
8 also give to the jury in order to cross-examine --

9 THE COURT: Yes.

10 MS. PICKERILL: Thank you.

11 THE COURT: Yes. And, in fact, I can give you a copy
12 of items that I think might be admissible.

13 MR. KEYES: That would be helpful, Your Honor.

14 MS. PICKERILL: Thank you, Your Honor. That would be
15 excellent.

16 THE COURT: Yes.

17 Willie, can you do that?

18 THE LAW CLERK: Yes.

19 MR. KEYES: Your Honor, while Willie is getting that,
20 assuming -- and we'll see from the list. But assuming that we
21 have some idea already of the documents that you're talking
22 about from our prior discussions, we do think that Evidence
23 Rule 106 would also -- once we see what those are and what the
24 defense intends to proffer or to show with Mr. DeFoe, we would
25 like the opportunity to identify any documents that under

1 Rule 106 we believe should come in for completeness of the
2 record.

3 THE COURT: Do you have some examples?

4 MR. KEYES: Yes, Your Honor.

5 So just speaking at a general level, if -- for
6 example, if the documents regarding Mr. Burk's proposed
7 determination come in, so if the November 2021 letter of the
8 termination action, if that were to be usable or admissible
9 with Mr. DeFoe, then under Rule 106 the adverse party is
10 allowed to tender additional evidence that -- in order to
11 present the question fairly to the jury.

12 So because that single letter as an ATF personnel
13 action was canceled, in ATF's own words, as part of the appeal
14 proceedings, we believe that it does not take the effect of an
15 agency action.

16 So the entire ATF --

17 THE COURT: Well, insofar as it refers to agency rules
18 and regulations and standards, I would think it would be
19 admissible.

20 MR. KEYES: Your Honor, so the admissibility issue,
21 it's the same objections that we have raised.

22 What I'm saying is under 106, if that document is
23 admitted, we also have the right to tender additional
24 documents. And I think other documents from the personnel
25 review are relevant because that November 2021 determination is

1 a nonfinal canceled determination, so it would not stand for
2 the agency's understanding or establishment of its standards
3 anymore than letters from --

4 THE COURT: Do you have something from ATF that would
5 contradict any of those standards?

6 MR. KEYES: Your Honor, we have the ATF written
7 deposition. We have letters -- yes. We have letters from
8 Agent Burk's supervisors that are part of the ATF records.

9 THE COURT: Are they going to testify?

10 MR. KEYES: I'm sorry?

11 THE COURT: Are they going to testify?

12 MR. KEYES: Well, Mr. Herndon would have been the only
13 supervisor being called in to testify. However, the documents
14 themselves are admissible under --

15 THE COURT: No, I don't think so. There would be no
16 right of cross-examination. That wouldn't be admissible. It
17 would be hearsay.

18 MR. KEYES: The same is true of the November 2021
19 letter because it's not an agency action.

20 THE COURT: It's an agency document.

21 MR. KEYES: Well, so are the letters from the
22 supervisors.

23 THE COURT: Okay. I'm not going to argue about it.

24 MR. KEYES: Thank you, Your Honor.

25 THE COURT: I think it's likely -- I'll give it more

1 thought, but I think it's likely admissible as evidence of
2 agency policy.

3 All right. We're going to let you work on getting
4 ready, and I'll be back in two hours.

5 Thank you.

6 MS. PICKERILL: Thank you, Your Honor.

7 THE COURT: The clerk may adjourn court.

8 THE COURTROOM DEPUTY CLERK: Please rise.

9 This court will stand in recess.

10 (Recess was taken at 10:56 a.m. to 1:10 p.m.)

11 - - -

12 TUESDAY AFTERNOON SESSION

13 NOVEMBER 5, 2024

14 - - -

15 THE COURT: Good afternoon, Counsel. Are we ready to
16 proceed?

17 MR. KEYES: Yes, Your Honor.

18 MS. PICKERILL: Yes.

19 THE COURT: All right. Well, let's start with defense
20 counsel's motion entitled Defendants' Second Supplemental
21 Motion in Limine to Exclude or Limit the Testimony of
22 Plaintiffs' Expert Scott DeFoe.

23 And who will be arguing on behalf of the defendants?

24 MS. ROSENBERG: Sheena Rosenberg, Your Honor.

25 THE COURT: Very well, Ms. Rosenberg. Please direct

1 me to the parts of Mr. DeFoe's testimony that you are objecting
2 to.

3 MS. ROSENBERG: Yes, Your Honor.

4 Do you happen to have the deposition transcript?

5 THE COURT: I do.

6 MS. ROSENBERG: Okay. If you can go to page 10.

7 THE COURT: Okay.

8 MS. ROSENBERG: Starting on line 11, and I will read:
9 They approached, ordered him to the ground. I thought --

10 THE COURT: Hold on a second.

11 MS. ROSENBERG: I'm sorry.

12 THE COURT: Page 10. All right.

13 MS. ROSENBERG: Line 11 it says: They approached,
14 ordered him to the ground. I thought his decision --

15 THE COURT: Not on the page 10 that I have. Page 10
16 is part of his qualifications. I have a Ph.D. in clinical
17 investigation --

18 MS. ROSENBERG: I'm looking at his deposition
19 testimony, Your Honor.

20 THE COURT: I think I am too.

21 MS. ROSENBERG: Document 53-1?

22 THE COURT: We had two depositions? Sorry, that was a
23 different expert.

24 All right. Okay. Page 10, line what?

25 MS. ROSENBERG: 11.

1 THE COURT: Line 11.

2 MS. ROSENBERG: Yes.

3 THE COURT: They approached, ordered him to the
4 ground. I thought his decision not to comply passively
5 resisting was reasonable based on the totality of the
6 circumstances because he was concerned that his back would have
7 been facing an environment that potentially a subject who may
8 have been home, may have been armed, so I could understand the
9 reluctance. And the fact I thought it was unique that he was
10 being proned out based on everything that I have just
11 previously described. When he was proned out, they were able
12 to handcuff his left hand.

13 Okay. So I don't think there's any evidence that
14 these officers knew any of this; that they could have ever had
15 any opportunity to guess that Mr. Burk's actions in resisting
16 were based on anything like this.

17 MS. ROSENBERG: No, Your Honor. Based on the
18 deposition testimony from both officers, there's no testimony
19 that they knew anything about Mr. Burk's investigation, why he
20 was there that day, because he didn't contact law enforcement
21 before that.

22 THE COURT: All right.

23 MS. ROSENBERG: And during their time with him he
24 never mentioned the reasons.

25 THE COURT: I understand your objection.

1 What does plaintiffs' counsel have to say?

2 MR. KEYES: A couple things on that point, Your Honor.

3 First of all, the use-of-force analysis looks at what
4 an objectively -- excuse me, what an objectively reasonable
5 officer would do under the totality of the circumstances. One
6 piece of the circumstances that these officers had when they
7 were responding to the scene, the evidence will show, is
8 information that this was a person who was an agent for the
9 Bureau of Alcohol, Tobacco, and Firearms, who was at a
10 residence telling the resident --

11 THE COURT: They didn't know that.

12 MR. KEYES: It was in the CAD display, Your Honor,
13 Joint Exhibit VIII.

14 THE COURT: They knew that the person had identified
15 himself as that, but they didn't know that that's who this
16 person was that they encountered.

17 MR. KEYES: Your Honor, they don't have to have actual
18 knowledge of the fact that he is an officer. What I'm saying
19 is that when they have information suggesting that he is a law
20 enforcement official, under the totality-of-the-circumstances
21 analysis, that information --

22 THE COURT: They didn't know he was a law enforcement
23 official or even have information to that effect.

24 MR. KEYES: Yes, they did, Your Honor. They had
25 information on their CAD display that he was -- produced a

1 badge, said he was an agent with ATF, gave his name, gave his
2 badge number.

3 THE COURT: But they didn't know that's who this
4 person was that they encountered until and unless they got his
5 credentials with his photograph on it and they could identify
6 him.

7 MR. KEYES: Well, except for the fact that, Your
8 Honor, the description that they had in the CAD -- white male,
9 gray shirt, tan pants -- is also the same description of the
10 person that they see at that front door.

11 THE COURT: That doesn't mean it's Mr. Burk. They
12 never met Mr. Burk. They don't know what Mr. Burk looks like.

13 MR. KEYES: Your Honor, they have a description of the
14 person at the door, and they see a person matching that
15 description as they pull up.

16 THE COURT: Okay. That's a small point that we're
17 arguing about, but -- well, that's really not a small point.
18 But I think there are even more problems here to take into
19 consideration that Mr. Burk might -- that Mr. Burk might have
20 some concern about, like he says, what was going on behind the
21 door. They certainly wouldn't have known anything about that.

22 MR. KEYES: Your Honor, they would have not known
23 specifically what was happening behind the door, I agree, but
24 they do have the following information -- the information I
25 just stated. They also know that the resident who was the

1 subject of Mr. Burk's encounter has not opened the door at his
2 request.

3 THE COURT: She doesn't have to open the door. That's
4 not a crime or any indicia of a crime.

5 MR. KEYES: Your Honor, it may not be a crime, but it
6 is another fact, it is another piece of information that they
7 have, that they have to consider in the totality --

8 THE COURT: All right. Well, when you add it all up,
9 there wasn't enough there to have any reasonable suspicion that
10 there was anything going on.

11 MR. KEYES: Your Honor, if I may? There's an
12 additional point of potential relevance. This is -- this
13 prong --

14 THE COURT: In fact, this person that they encountered
15 never told them, hey, I'm concerned about this situation here
16 that I have got. He never said anything about that, and
17 there's no -- they didn't know anything about why he was there.
18 In fact, we now know he was there for an administrative
19 function, not for some kind of a law enforcement function.

20 So I'm going to sustain this objection.

21 MR. KEYES: Your Honor, if I may? The second prong I
22 was referring to -- well, I do have to take issue with the
23 distinction between administrative function and law enforcement
24 function.

25 Administrative functions can still be law enforcement

1 functions. The distinction --

2 THE COURT: If some facts develop that would lead to
3 that conclusion, but there aren't any. Certainly none that
4 were known by these Columbus Police officers.

5 MR. KEYES: I understand, Your Honor. The
6 distinction --

7 THE COURT: So I'm going to grant this objection.

8 MR. KEYES: Your Honor, there is a conditional
9 relevance argument that I have to propose as well.

10 Setting aside that issue that the Court just went
11 through, this evidence becomes relevant if the defendants
12 present evidence, which they intend to do, that Mr. Burk --

13 THE COURT: Well, we'll wait and see if they do.

14 MR. KEYES: All right. But, Your Honor, on that
15 point, if they intend to --

16 THE COURT: They're going to present evidence of what?

17 MR. KEYES: If they intend to present evidence of what
18 the expectations would be of a federal law enforcement
19 official, then the -- what is going on in the mind of that
20 federal law enforcement official does become relevant, even
21 separate from the *Graham v. Connor* analysis.

22 So in other words, if they are saying it was
23 unreasonable for Mr. Burk to do X, Y, or Z, that itself would
24 call for an explanation of why he did X, Y, or Z.

25 So that is another issue that they have raised that --

1 now, if they don't approach Mr. DeFoe with that line of
2 cross-examination, then this conditional relevance issue does
3 not arise. But we heard them already question already Mr. Burk
4 about whether he was complying with federal law enforcement
5 standards.

6 If they are going to question Mr. Burk's actions from
7 the point of view of a federal law enforcement official, then
8 that does bring into relevance what he was experiencing in his
9 mind at the time of the -- of this encounter, and so there is a
10 conditional relevance aside from that initial one.

11 THE COURT: Okay. Well, we'll see.

12 All right. What's the next part of Mr. DeFoe's
13 testimony that's objected to?

14 MS. ROSENBERG: Well, Your Honor, most of the
15 testimony that we are objecting to is just along those lines,
16 the different questions he's asked about -- I'm sorry.

17 THE COURT: We need to know what it is, what page.

18 MS. ROSENBERG: Okay. Let's go to page --

19 THE COURT: So I'm not going to permit him to testify
20 to the things beginning at line -- your objection starts on
21 line 11, right?

22 MS. ROSENBERG: Right.

23 THE COURT: And where does it end?

24 MS. ROSENBERG: Line 11 through 18.

25 THE COURT: Well, what about the rest of it?

1 MS. ROSENBERG: Well, I think we read to line 22 into
2 the record.

3 So the question goes all the way through -- page 11,
4 line 23 is the end of it, that particular part of it.

5 THE COURT: Well, it's -- so is Winchell laying on his
6 right side, which prevented him from complying?

7 MS. ROSENBERG: That is what Mr. Burk testified to.

8 THE COURT: And Officer Fihe did tase him to effect
9 the handcuffing technique.

10 So I think there is a legitimate issue here about the
11 amount of force that was used to enforce compliance with the
12 order issued, and the jury is going to have to decide whether
13 he resisted or not.

14 MS. ROSENBERG: Mr. DeFoe --

15 THE COURT: Whether he was able to comply.

16 MS. ROSENBERG: Mr. DeFoe later testified about the
17 fact that officers are not expected to understand the reasons
18 why someone is resisting at the time; it's just how they
19 perceive it.

20 So they're not expected to figure out the whys at the
21 time. I can point that testimony out for you.

22 THE COURT: Well, this raises this question: So can
23 the expert testify what he thinks happened?

24 The jury has got to decide what happened. They have
25 got to decide it based upon the evidence they hear, and some

1 expert shouldn't be telling them what the facts are.

2 It says: He was laying on his right side, which
3 prevented him from even complying.

4 Well, Mr. DeFoe doesn't -- he wasn't there. Even if
5 he was, it would only be his opinion as to whether -- so.

6 MS. ROSENBERG: I would agree with that, Your Honor.
7 I don't think Mr. DeFoe --

8 THE COURT: That would have to be a hypothetical
9 opinion, something like, Mr. DeFoe, assuming the jury should
10 find from the evidence that Officer Winchell was lying on
11 Mr. Burk's right side and that that prevented him from
12 complying. But he's not going to be able to give his opinion
13 as to what happened.

14 So I'm going to sustain that part of the objection.

15 MR. KEYES: Your Honor --

16 THE COURT: I think, likewise, that he would have to
17 say, with regard to the use of the TASER, that he would have to
18 assume that the jury should find, after hearing all the
19 evidence, that Mr. Burk didn't resist and that there was no --
20 that the use of the TASER was unreasonable because he was
21 complying or attempting to comply, but he's not going to --
22 that, again, would have to be a hypothetical question --

23 MR. KEYES: Your Honor, plaintiffs --

24 THE COURT: -- not just him giving his opinion.

25 So I would be sustaining objections if he -- to all of

1 this. Though I see in the deposition -- if that's how he
2 proceeded at trial, I would require that all of this be phrased
3 in the way of hypothetical findings by the jury.

4 So that's going to be my order in regard to -- and my
5 expectation, then, in regard to how Mr. DeFoe should be
6 prepared to testify in this case.

7 MR. KEYES: Yes, Your Honor, plaintiffs agree. I
8 mean, that's true of any expert testimony; that if the subject
9 of the testimony would depend on the outcome of disputed facts,
10 those are posed as a hypothetical that the jury ultimately may
11 or may not agree with. We have no issue with that because
12 that's the standard for any expert that comes in here.

13 THE COURT: All right. Now, I have not heard any
14 evidence which would support a reasonable officer, in the
15 position of Mr. Burk, having perceived that there was a threat
16 inside the premises that he arrived at and spoke to the
17 individual inside about and that -- certainly the defendant
18 officers wouldn't have known about any of those things, and
19 there's no evidence that they did.

20 So unless something changes and there's some evidence
21 produced that the defendants knew about it or that he had some
22 additional information he hasn't told us about that caused him
23 to be concerned about some threat, I don't think it was
24 objectively reasonable for him to have entertained that as a
25 reason -- entertained that thinking as a reason to refuse to

1 comply with the lawful orders issued by Officers Fihe and
2 Winchell.

3 And I -- as I have indicated in my order, it's my
4 belief that they were in command and control of this scene.
5 And they were entitled to issue orders, and Mr. Burk was
6 required to comply with them.

7 All right. What's the next area that you object to?

8 MR. KEYES: Your Honor, I'm sorry. Before they move
9 on. The comments that Your Honor concluded with, is that still
10 relating to lines -- page 10, lines 11 through 18?

11 THE COURT: That would include any reference to this
12 proposition that Mr. Burk reasonably had some objectively
13 reasonable fear that there was a threat inside the residence
14 that he had visited.

15 MR. KEYES: Your Honor, if I may?

16 THE COURT: There's no evidence to support that.

17 MR. KEYES: Respectfully, Your Honor, for our record,
18 Mr. Burk testified that he was conducting an investigation and
19 retrieval attempt on an unlawfully possessed firearm.

20 THE COURT: It wasn't unlawful. I haven't heard any
21 evidence he had authority even to seize the weapon. He was
22 there to ask them to return it and/or to bargain with them
23 about returning it and getting a refund or finding some other
24 member of the family that might be able to complete the
25 purchase and so forth.

1 As he described it himself, it's a knock and talk.

2 It's not -- so.

3 MR. KEYES: Your Honor.

4 THE COURT: Anyhow, that's my ruling on that.

5 MR. KEYES: I understand, Your Honor. At some point I
6 would like to make a proffer for the record. It doesn't have
7 to be right now.

8 THE COURT: Well, sure, you can.

9 MR. KEYES: Okay.

10 THE COURT: Absolutely.

11 MR. KEYES: Thank you, Your Honor.

12 I think the evidence that would support a reasonable
13 concern --

14 THE COURT: Well, when you make your proffer, you
15 can --

16 MR. KEYES: Oh, I'm sorry. I thought you meant right
17 now. I apologize.

18 Thank you, Your Honor.

19 THE COURT: Okay. What's the next part of Mr. DeFoe's
20 testimony that defense counsel objects to?

21 MS. ROSENBERG: Your Honor, I just found different
22 excerpts that are based on the same guidelines that you just
23 proposed, different times where he said that it was reasonable
24 for Mr. Burk to not consider -- to not comply because of his
25 subjective concerns.

1 So there's no additional objections that we have that
2 are outside of what you just talked about.

3 THE COURT: I have already given the jury instructions
4 that Officers Fihe and Winchell were in charge of the scene and
5 that they were the -- they had the authority to issue orders to
6 Mr. Burk and that he was required to follow them.

7 The issue is whether he -- whether they used
8 reasonable force in bringing about compliance with those
9 orders. And in the case of the use of force to handcuff him,
10 there is a legitimate issue of fact as to whether or not he
11 resisted.

12 If he didn't resist, then there would not be any
13 justification for the use of force, any force, and Mr. Burk
14 wins if that's the case, the jury finds that he didn't resist
15 or couldn't resist because of the circumstances created by the
16 officers.

17 But if he did resist, then it depends upon an
18 assessment of the nature and extent of the resistance as to
19 whether or not the force was reasonable under the
20 circumstances.

21 And the same analysis would apply to the detention of
22 Mr. Burk during the various stages.

23 So that's the kind of testimony that I would expect
24 and consider appropriate from the plaintiffs' use-of-force
25 expert. In fact, it was some of his own testimony that

1 supported the Court's finding that the uniform standards of law
2 enforcement placed Officers Fihe and Winchell in control of
3 this scene and that they had the command authority to issue
4 orders, and I am -- it's obvious from his testimony that he is
5 relying on these universal standards governing law enforcement
6 officers, federal and state, when they are involved in a
7 situation where a plainclothes officer, that his authority as
8 an officer is being challenged by uniformed officers.

9 The only thing I am not satisfied about quite yet is
10 whether he -- whether those principles also required him to
11 prepare for the arrival of these uniformed officers. He knew
12 they were coming, that's for sure, and he had plenty of time to
13 prepare. It may well be that instead of waiving around a
14 manila file, he should have been waiving around his credentials
15 so that these officers could see his photograph and his
16 credentials and see that this is, in fact, the guy he claims to
17 be.

18 All right. So that's how the Court expects
19 Mr. DeFoe's testimony to be structured. If there are
20 departures from that framework, then the objections are going
21 to be sustained as his testimony develops.

22 Now, is there anything else more specific that we need
23 to address?

24 MS. PICKERILL: About DeFoe's testimony specifically,
25 Your Honor, or in general?

1 THE COURT: Yes, about DeFoe's testimony.

2 MS. PICKERILL: Did you want to address the excerpts
3 that both counsel had taken out as part of this discussion, or
4 save that for afterwards?

5 THE COURT: That would be the next matter that I would
6 want to look at.

7 MS. PICKERILL: Okay. Then nothing until then, Your
8 Honor.

9 THE COURT: All right. Now, Mr. Keyes, you have
10 identified certain documents, including deposition testimony
11 of -- well, the first one is Officer Fihe that I have.

12 So, defense counsel, have you looked at these
13 deposition excerpts that plaintiffs' counsel wants to -- he
14 wants to have Mr. DeFoe consider in expressing his opinions in
15 this case?

16 MS. PICKERILL: I have had a chance to review them,
17 yes, Your Honor.

18 THE COURT: All right. Any problems here?

19 MS. PICKERILL: I suppose perhaps a bit of
20 clarification. I was reading them with the understanding that
21 plaintiff was desiring to read these excerpts to the jury.

22 THE COURT: Oh, I don't think so.

23 MS. PICKERILL: Okay. No, Your Honor, then we do not
24 have any --

25 THE COURT: Let me make sure.

1 MR. KEYES: Your Honor, frankly, the proposal is a
2 little bit fluid because, since we have an expert coming on
3 before we have had the opportunity to question either defendant
4 officers live, one way to do that would be to read the
5 deposition testimony to the jury so that the facts are in
6 evidence before the expert testifies.

7 Alternatively, if everybody is in agreement and the
8 Court is okay with it, I can provide these excerpts to
9 Mr. DeFoe ahead of his testimony and he can take that -- take
10 those excerpts for what they are worth, with the understanding
11 that at some point, whether it's in our case in chief or in
12 defendants' case in chief, this testimony in one form or
13 another is going to come in. I'm fine doing it that way
14 instead of taking the jury's time by reading it to them before
15 Mr. DeFoe testifies.

16 THE COURT: Well, that's fine. That's how I would --
17 I think that's the best way to proceed.

18 MS. PICKERILL: Your Honor, Mr. DeFoe has already,
19 prior to making his conclusions in this case, reviewed the
20 deposition transcripts in their entirety for both officers, so
21 we certainly wouldn't have an issue with him considering these
22 excerpts along with the entirety of the deposition, but we
23 would have an objection to having them read to the jury at this
24 time.

25 THE COURT: Okay. That objection has been resolved.

1 MS. PICKERILL: Perfect.

2 THE COURT: All right. So there's -- all right. That
3 resolves that part.

4 MR. KEYES: I'm sorry, Your Honor.

5 THE COURT: What about the deposition of Officer
6 Winchell?

7 MS. PICKERILL: The same, Your Honor. We would have
8 the same stance on that one. We have no issue with Mr. DeFoe
9 taking into account the deposition transcript, which he has
10 reviewed in its entirety, of Officer Winchell; but to read
11 portions of it without context into the record at this time
12 would be inappropriate.

13 THE COURT: You disagree?

14 MR. KEYES: We disagree that it's inappropriate.
15 However, under the context of the Court's rulings, we are fine
16 proceeding with that way.

17 The whole point, Your Honor, is I can't offer expert
18 testimony without certain foundational material being in the
19 record, and so far it's not in the record.

20 THE COURT: Well, either that or you vouch for it.

21 MR. KEYES: Right. Right.

22 THE COURT: It's in the record, and so that's good.

23 MR. KEYES: And that's fine. I'm just -- when we're
24 at the close of our case, if this testimony has not been
25 admitted, we will have to reserve resting subject to

1 questioning those officers in defense's case. So we may have a
2 little bit of unusual procedure at the close of our witnesses,
3 is all I'm saying.

4 Certain things happen at the close of the plaintiffs'
5 case that, without this testimony coming into the record, we
6 would have to change the order in which things usually go. So
7 I'm just -- I'm highlighting that issue for defense counsel and
8 the Court because this information will be in the record, but
9 if we're not presenting it now, then at the close of our case
10 in chief we sort of have -- you know, it's an incomplete record
11 at that point.

12 But logistically, with the order of witnesses that the
13 Court has instructed us, that's the situation that we're --
14 that's our reality for this trial.

15 THE COURT: They would then, of course, be part of the
16 record the Court would have to consider in ruling on any
17 motions that are made at the end of the plaintiffs' case.

18 MR. KEYES: Yes, Your Honor. Thank you.

19 THE COURT: That's the important part for you and also
20 for the -- preparing your expert to testify.

21 Now, next is a written deposition of a representative
22 of the ATF. And who was this person?

23 MS. PICKERILL: There are actually four individuals,
24 Your Honor, who answered questions.

25 THE COURT: Four individuals?

1 MS. PICKERILL: They are listed at the very beginning
2 after the definitions. ATF gives -- they're color-coded.

3 THE COURT: All right. I have a list of page numbers,
4 and apparently I have all of those pages.

5 So are there any objections to any of these deposition
6 excerpts?

7 MS. PICKERILL: Your Honor, we would object to six of
8 the excerpts that plaintiffs proposed, and we would also --

9 THE COURT: Object to what, please?

10 MS. PICKERILL: I'm sorry. To six.

11 THE COURT: To six.

12 MS. PICKERILL: Plaintiffs proposed a list of the
13 questions that they present -- wish presented to the jury. I
14 believe it was sent in an e-mail before we got back.

15 So, yes, we would argue that only some of these are
16 relevant to the case.

17 It's 44, 49, 50, 55, 57, and 64.

18 THE COURT: Hold on a second. 44, 49, 50.

19 MS. PICKERILL: 55.

20 THE COURT: 55.

21 MS. PICKERILL: 57.

22 THE COURT: 57.

23 MS. PICKERILL: And 64.

24 THE COURT: 64. All right.

25 MS. PICKERILL: Specifically from the list that

1 plaintiffs provided.

2 And we would argue that there are a number of
3 additional questions that, in fairness, should be included with
4 the list that plaintiffs gave.

5 THE COURT: Okay. So do you have your own list?

6 MS. PICKERILL: Yes.

7 THE COURT: Okay. Well, let's deal with this -- with
8 plaintiffs' counsel's list first, and let's look at your
9 objection to No. 44.

10 MS. PICKERILL: Perfect.

11 And I might be able to save some time. My objection
12 to all of those is going to be the same. Those are all
13 questions that ATF answered. They did not -- it says: Unknown
14 what training James Burk had regarding such interaction. Would
15 possibly have to request records from his initial ATF academy
16 and FLETCE training if available and/or documented.

17 We would argue that questions with that particular
18 answer are not relevant or helpful to the jury since they don't
19 answer the question one way or the other because whoever was
20 answering the question didn't know the answer.

21 MR. KEYES: Your Honor, it does go to an issue that
22 the defense has injected into the case and that the Court has
23 repeated multiple times that it's concerned about, which is the
24 existence of uniform national law enforcement standards and
25 what they would require in this particular case.

1 And these questions -- now, this was not directed at a
2 specific individual. This written deposition by the City was
3 directed to ATF as an agency, and the answer provided -- so,
4 for example, Question 44 reads: As an ATF law enforcement
5 agent, was James Burk given training on how to respond and act
6 if and when local law enforcement arrives at the scene of a
7 retrieval?

8 The fact that the agency itself did not have any
9 information whether James Burk received training on that
10 interaction is evidence that a uniform standard requiring
11 specific actions of Mr. Burk in that situation does not exist.

12 So the fact that they're directing these questions to
13 the agency that employed him and the agency is saying we don't
14 have information about that training, you might have to go to
15 some other source, is evidence that, at least within ATF, the
16 existence of specific factual standards or specific -- I'm
17 sorry, specific actions -- standards for specific actions that
18 Mr. Burk would have to take, we would submit that those
19 questions and ATF's answers are evidence that the jury can
20 consider that no such specific standards or training existed.

21 THE COURT: Well, we saw that right now. That's not
22 for the jury to decide. That's something I'm going to decide,
23 and I feel that there is sufficient evidence in the record to
24 support the existence of those standards, and I, in fact, have
25 so instructed the jury.

1 So those are -- this may be -- I think that it's
2 certainly well to include this in the record so that you will
3 be able to make those arguments to the court above.

4 So it's not something that we're going to be giving to
5 the jury because it's not relevant to any issue they're going
6 to have to decide.

7 MR. KEYES: And then to that point, Your Honor --

8 THE COURT: But I think they belong in the record.

9 MR. KEYES: We appreciate that, Your Honor, and I'll
10 state for the record that as to -- we would have the same
11 argument as to the other -- so, for the record, all six of
12 those objected questions and answers, 44, 49, 50, 55, 57, and
13 60, we would make the same argument as to each of those; the
14 Court would have the same ruling.

15 Then our only request, Your Honor, would be -- so if
16 you recall at the beginning of the case when you gave the
17 preliminary instruction about national law enforcement
18 standards, there was some discussion about including a specific
19 statement in there about whether he had to have his --

20 THE COURT: And I took that out.

21 MR. KEYES: Yes, you did. And our understanding, Your
22 Honor, was that --

23 THE COURT: I'm still up in the air on that one.

24 MR. KEYES: Exactly. So we do think -- Your Honor
25 mentioned maybe these are more relevant for a higher court.

1 THE COURT: I'm still waiting to hear some testimony
2 about it.

3 MR. KEYES: And we appreciate that, and I think that
4 these answers would be relevant for your consideration, even if
5 they're not read to the jury, when it comes time to do final
6 jury instructions on those issues.

7 THE COURT: So these standards must be written down
8 somewhere. Where are they?

9 MS. PICKERILL: Your Honor, specifically in the
10 excerpts that we provided shortly before this meeting that
11 we're having, from the Notice of Proposed Removal, ECF No.
12 57-6, ATF lists out the specific four orders.

13 THE COURT: Well, here's what I'm -- I can tell from
14 the testimony of the experts and from the contents of the ATF's
15 disciplinary file that there is a body of uniform accepted
16 rules that apply to this kind of situation, and I'm waiting
17 for -- it would be very helpful if someone could find where
18 these rules are written down, but everybody seems to agree that
19 they're -- those are the rules of engagement and the rules of
20 command and control when a nonuniformed officer's authority is
21 challenged by uniformed officers at a scene.

22 So am I going to hear about that from any witness?

23 MS. PICKERILL: I believe so, Your Honor.

24 THE COURT: Who?

25 MS. PICKERILL: Keith Leighton will testify to the

1 standards of federal law enforcement agents and how those are
2 consistent with what Your Honor has instructed the jury and
3 consistent with what local law enforcement standards are.

4 Additionally, ATF in their documentation specifically
5 cited four ATF policies that were violated by Mr. Burk, and
6 they gave the text of those policies.

7 THE COURT: Well, those were very nebulous policies,
8 but they do refer to standards of the LEO profession, but they
9 don't quote them or they don't say where they're found, but
10 everybody seems to agree that they exist.

11 Is it simply -- well, I don't know. Anyhow.

12 All right. What other issues do we have?

13 MS. PICKERILL: I suppose before I answer that, are we
14 anticipating that any of the excerpts provided by either
15 parties are going to be read to the jury during plaintiffs'
16 case in chief?

17 THE COURT: Say that again.

18 MS. PICKERILL: Is the plan for any of these excerpts
19 that we have provided from --

20 THE COURT: Excerpts?

21 MS. PICKERILL: The quoted pieces from Fihe's
22 deposition, Winchell's deposition, ATF's deposition, and the
23 ATF documents.

24 THE COURT: I haven't heard that any of them are.

25 MR. KEYES: Your Honor, the defendant officers'

1 depositions, we have addressed that issue a moment ago. So
2 we're fine with leaving those as part of the record for
3 whatever purpose it may come up at the close of our case.

4 As for the ATF written deposition questions that we
5 have tendered designations for, those I would think we should
6 be entitled to read to the jury for them to take into
7 consideration because ATF as an agency is not subject to
8 subpoena of a corporate or agency representative to testify in
9 court. The Rule 31 written deposition is their form of
10 testimony.

11 THE COURT: Yes.

12 MR. KEYES: And so that --

13 THE COURT: Didn't I just say I'm going to make that
14 decision and not the jury, as to whether there were uniform
15 standards and what they were?

16 MR. KEYES: So, yes, you did about the uniform
17 standards, but I'll give you an example of where I'm a little
18 bit concerned, Your Honor.

19 If the defense is going to argue -- and we had some
20 questioning of Mr. Burk on cross-examination along these
21 lines -- that, well, you didn't have your credentials out and
22 at the ready when Officer Fihe pulled up, they're suggesting to
23 the jury in that question that that was an improper action by
24 Mr. Burk.

25 But if in the ATF deposition there's an acknowledgment

1 that there's no formal policy or requirement that he have his
2 credentials out when he knows law enforcement is approaching,
3 that is something we should be able to explain to the jury.

4 THE COURT: Well, I think it's something that the
5 officers can consider in their assessment of whether or not
6 this individual is, in fact, what he claims to be. And we have
7 heard him testify about his experience, and I think we're
8 probably going to hear these officers testify about theirs as
9 well.

10 So I have been able to determine the existence of
11 certain principles, I think without any doubt, because all the
12 experts agree on them, and that's the issues of command and
13 control.

14 So these written deposition responses from ATF are not
15 something that add anything to my analysis, and we're not going
16 to have the jury making a finding as to whether or not some
17 principles exist. So they're not going to get read to the
18 jury, but they will be in the record.

19 MS. PICKERILL: Yes, Your Honor.

20 MR. KEYES: Thank you, Your Honor.

21 MS. PICKERILL: And is that -- this might be a silly
22 question. When we say that they're part of the record, is that
23 something that's going to be back with the jury -- that's not
24 something that's going to go back with the jury to deliberate?

25 THE COURT: No, no, no. It won't go back to the jury.

1 MS. PICKERILL: Perfect.

2 THE COURT: Anything else?

3 MS. PICKERILL: Your Honor, this might be a bit
4 premature. So if I'm asking it too soon, we can come back to
5 it later.

6 We had talked about Mr. DeFoe being able to rely on
7 portions of the defendants' depositions. When Agent Leighton
8 testifies, will he similarly be allowed to rely on excerpts
9 from the ATF documents?

10 THE COURT: From the ATF documents?

11 MS. PICKERILL: From the Notice of Proposed Removal
12 and the decision on termination where they discuss the policies
13 and the unbecoming conduct.

14 MR. KEYES: We would have an objection to that, Your
15 Honor.

16 THE COURT: I have given the jury instructions as to
17 what those rules are.

18 MS. PICKERILL: Yes, Your Honor. I understand.

19 Thank you.

20 THE COURT: So there's no reason to get into the
21 disciplinary record to address any of those issues. I've told
22 the jury what the standards are.

23 MS. PICKERILL: Understood.

24 THE COURT: So, no, I'm not going to let you dig into
25 the disciplinary file.

1 MS. PICKERILL: Yes, Your Honor.

2 THE COURT: Plaintiffs' counsel, anything else we need
3 to resolve before we continue with our trial?

4 MR. KEYES: No, Your Honor, that's it for us.

5 Thank you.

6 THE COURT: All right. I think now you will be able
7 to properly prepare Mr. DeFoe for his testimony.

8 MR. KEYES: Yes, Your Honor.

9 THE COURT: He's going to be the next witness, right?

10 MR. KEYES: He will be our next witness. Since he's
11 now testifying tomorrow instead of this morning, he's actually
12 going to be here in person.

13 THE COURT: All right. That's even better.

14 All right. Anything else we can do today to advance
15 things?

16 MS. PICKERILL: I don't think we have anything from
17 the defense, Your Honor.

18 THE COURT: Why don't you all settle this case?
19 Pretty much know what the jury is going to have.

20 MR. KEYES: We'll keep talking, Your Honor.

21 I did have, just logistically in terms of -- would you
22 like me to make my proffer for the court reporter now on the
23 matters that we talked about, or wait until Mr. DeFoe's
24 testimony has completed?

25 THE COURT: Go ahead and make it.

1 MR. KEYES: Okay. Thank you.

2 Proffer for Mr. DeFoe's testimony, which we understand
3 to be excluded by the Court's order.

4 We do think that it would be proper for Mr. DeFoe to
5 offer testimony about the reasonableness of Agent Burk's
6 concerns of what was happening behind the door at the condo;
7 and we do think that there was evidence in Mr. Burk's testimony
8 that could support an objectively reasonable concern of
9 activity, including the fact that the resident had not opened
10 the door, the residence was believed to contain a firearm
11 purchased by a prohibited individual, which we would call an
12 unlawfully purchased firearm, and that Mr. Burk testified he
13 could hear multiple people moving around in the house and yet
14 only one person talked to him and only did so through a closed
15 door and through a window.

16 We would submit that that information would be proper.
17 We still have our conditional relevance argument as well,
18 depending on whether defense offers evidence through
19 Mr. Leighton or otherwise about Mr. Burk's perceptions or
20 concerns.

21 Thank you, Your Honor.

22 THE COURT: Very well.

23 All right. We're going to recess and -- or adjourn
24 for the day, and we'll see you all tomorrow morning at 9:00.

25 Everybody have a nice evening.

1 THE COURTROOM DEPUTY CLERK: Please rise.

2 This court is adjourned.

3 (Proceedings concluded at 2:02 p.m.)

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WITNESS INDEX

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<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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PLAINTIFFS':

James A. Burk, Jr.	163		185	
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C E R T I F I C A T E

I, Crystal Hatchett, do hereby certify that the foregoing is a true and correct transcript of the proceedings before the HONORABLE JAMES L. GRAHAM, Judge, in the United States District Court, Southern District of Ohio, Eastern Division, on the date indicated, reported by me in shorthand and transcribed by me or under my supervision.

s/Crystal Hatchett
Crystal Hatchett
Official Federal Court Reporter
January 2, 2025